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INSANITY AS A DEFENSE TO A TORT ACTION. — As a general rule, insane persons are liable for their torts.[1] Public policy is thought to overcome the technical difficulty that since such people are often incapable of volition, the things which they do are not strictly their own acts. Since it is a question which of two innocent estates shall suffer, putting the loss on the property of the insane defendant is thought to secure greater vigilance by his guardians, and to be desirable as protecting the public.[2] It has been suggested that this rule is too strict, and that wherever the state of a man's mind is important, as in negligence or malicious prosecution, insanity should be a defense.[3] The same considerations of public policy, however, apply here, and it is hard to see why, if the law holds a man in spite of his inability to do otherwise, it should not also hold him in spite of his inability to exercise due care or to harbor malice. In this connection the attitude of the courts toward slander and libel is interesting. In America it is considered fairly well settled, on the strength of three or four decisions and several *dicta*, that insanity is a complete defense in such an action.[4] In England the only authority seems to be a *dictum* that it is no defense.[5] The reasons given for the American attitude are two, that malice, of which

[1] See Weaver *v.* Ward, Hob. 134.
[2] McIntyre *v.* Sholty, 121 Ill. 660.
[3] Holmes, Common Law, 109; see 10 HARV. L. REV. 182.
[4] Bryant *v.* Jackson, 6 Humph. (Tenn) 199; Horner *v.* Marshall's Administratrix, 5 Munf. (Va.) 466; Gates *v.* Meredith, 7 Ind. 440. See Avery *v.* Wilson, 20 Fed. Rep. 856
[5] See Mordaunt *v.* Mordaunt, 39 L. J. Prob. & Matri. 57, 59.

an insane mind is incapable, is a necessary ingredient of these actions, and that presumptively publications from such a source do not injure. On these grounds the Court of Appeals of Kentucky has recently added another decision to the American group. *Irvine* v. *Gibson*, 77 S. W. Rep. 1106.

It is submitted, however, that neither the English *dictum* nor the American doctrine is satisfactory. The liability should not be absolute, nor the defense complete. It is true, malice is usually regarded as essential to libel or slander, but that has come to mean merely "legal malice," which is inferred from the voluntary act.[6] So here again the only reason an insane person should escape is the absence of volition, and it has been seen that that is no defense under the general rule. Even if actual malice were required, however, it is hard to comprehend, as has been said, why public policy may not as well dispense with this as with the necessity of volition. Of course the absence of intent and of malice is always important to prevent punitive damages.

The second reason given for the American attitude is more important. Undoubtedly there is a presumption that the vaporings of a diseased brain do not injure, yet this is not always true. The public may be ignorant of the insanity, or it may be such that the words still have some weight.[7] The presumption that such utterances are not damaging should be a rebuttable presumption, not an absolute one. In ordinary slander, this would leave only the usual burden on the plaintiff, but where an action is maintainable without proof of damage, as in assault, libel, and slanderous words actionable *per se*, it would do away with that exemption, and make it necessary for the plaintiff to show some actual damage before he could succeed. Only when no actual damage can be shown, should the defense be complete.

CONTRACTS IN RESTRAINT OF TRADE WITHIN THE SHERMAN ANTI-TRUST LAW. — Probably no current legal question is of such importance to the business world as the meaning of the first section of the Sherman Anti-Trust Law which forbids "every contract, combination . . . or conspiracy, in restraint of trade" among the states. It seems a hopeless effort to attempt to spell out of the mass of federal decisions any serviceable and yet entirely uniform interpretation. At the beginning two positions at least were open to the courts. They might, first, have taken the conservative view that the statute forbids only those unreasonable contracts in restraint of trade which are invalid at the common law.[1] There is good reason to believe that this interpretation of the statute is what the framers had in mind.[2] Viewed in this light, the act merely adds a new federal remedy against the making of contracts in restraint of interstate trade, making penal what before was simply invalid. The opinion has been advanced that all, or nearly all, the cases can be sustained, as decisions on the facts, by this interpretation. But in at least one leading case, dealing with interstate carriers, the Supreme Court held bad a seemingly reasonable traffic agreement, the ground of invalidity being, apparently, that it did away with competition.[3] At common

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[6] Bromage *v.* Prosser, 4 B. & C. 247, 253.
[7] See Dickinson *v.* Barber, 9 Mass. 225; Yeates *v.* Reed, 4 Blackf. (Ind.) 463.

[1] See Rousillon *v.* Rousillon, 14 Ch. D. 351.
[2] Cong. Rec. xxi, pt. 4, pp. 3146, 3148.
[3] U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 290.